Filed 10/19/12 P. v. Barrie CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MARCUS BARRIE, Defendant and Appellant.	C067323 (Super. Ct. No. 09F07996)

A jury convicted defendant Marcus Barrie of two counts of home invasion robbery (Pen. Code, §§ 211, 213, subd. (a)(1)(A); counts 2 and 3), and one count of false imprisonment by violence or menace (Pen. Code, § 237, subd. (a)), as a lesser included offense of count 1, kidnapping for robbery, all with enhancements for a principal being armed with a firearm (Pen. Code, § 12022, subd. (a)(1)). The trial court sentenced him to nine years and four months in prison.

On appeal, defendant contends the trial court prejudicially erred in admitting gang evidence at trial. As we will explain,

although the trial court's admission of the challenged gang evidence was error, it was harmless. We shall affirm.

FACTS

The Crimes

About noon on Saturday October 24, 2009, 74-year-old Larry Taylor was vacuuming his car's interior in the driveway of his South Land Park house. When tapped on the shoulder, he turned to see a gun in his face, either a .32 or a .38, and three individuals. One asked for his wallet. Taylor said he did not have it, patting himself down to prove it, and took out his cell phone. One of the robbers broke the phone.

They forced Taylor into the garage and told him to get on his knees. When Taylor said he was unable to kneel due to knee surgery, the robbers hurried him into his house. Inside, one robber stayed with him while the others went into the back of the house. They took his wallet, a few hundred dollars in cash, a coin collection, jewelry and a camera.

While the robbers were ransacking Taylor's house, a neighbor's alarm went off. Two robbers ran back to Taylor and told him to shut it off. Taylor said he could not and since several legislators lived in the neighborhood, the police would arrive in a few minutes. The robber with the gun cocked it and asked, "Do you want it now?" Then all three left. Taylor got a shotgun to go after them, but decided to call the police instead.

Randy Balzarano was in the area at the time, taking his son to soccer practice. He heard the burglar alarm and saw three

young males walking fast to a car. The car was an older teal Chevy Corsica. The car "peeled out" and Balzarano had to push his son out of the way as the car sped by. He remembered a partial license plate: 2WK. There were four men in the car; the driver was older, 30 to 40, and heavy set.[1]

Balzarano went down the street toward the sound of the alarm. He came across Taylor, who was on the phone to the police; Taylor handed the phone to Balzarano.

Robert Nakatomi was also in the area to visit his grandmother. He saw three Black males, one in a Cincinnati Reds baseball cap, at a casual run. The men had mischievous grins like they had gotten away with something. Nakatomi made a U-turn and saw Taylor, who told him he had been robbed. Nakatomi drove around looking for the robbers, but did not see them again.

The police found Delwayne Jacobs's fingerprint on Taylor's closet door.[2] Taylor identified Jacobs as possibly the robber with the gun.[3]

Two days later on Silvies Way in Elk Grove, Brian Immoos was on his couch watching television with his front door open.

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[1] Defendant was only 19 at the time, but he weighed 250 pounds.

[2] Jacobs was tried with defendant, before a separate jury.

[3] Taylor also identified Edward Thomas as the possible gunman, but he was not sure. Thomas was charged with defendant and Jacobs, but the court dismissed the charges before trial on the People's motion citing insufficient evidence.

Four males came in and one waved a gun in his face. The gunman flipped the couch over looking for weapons, and the others went through the house yelling, "Make him tell you where the guns are." When Immoos said he had no guns, the robbers asked for jewelry and "stuff." The robbers ransacked the house, taking a set of car keys, change, a roll of coins and some work gloves.

The gunman, identified by Immoos as Jacobs, threatened about five times to shoot Immoos. Jacobs had a small caliber gun, like a .22. Before the robbers left, they tied Immoos up with an extension cord. As the robbers left, one said, "Start the car."

That same day, Immoos's neighbor saw four Black males get out of a greenish car and put their hoods up, although it was a hot day. She saw cigarette smoke coming from the car, and realized the driver was still inside. She told the police that the driver also had his hood up. The four came hurrying back in 10 minutes. The neighbor described the car as looking like a Chevy Corsica.

Defendant's Statement to Police

Less than two weeks after the robberies, the police stopped a teal Chevy Corsica with a license plate beginning with 2WK. Defendant was the driver and his passenger was Eric Davis. Defendant told an officer during the stop that he had last been in Elk Grove two or three months ago.

Robbery Detective Michael Mullaly interviewed defendant. Defendant stated he was 19 and drove a teal Chevy Corsica; no

one drove it but him. Defendant told varying stories about what happened the days of the robberies.

Defendant said that on October 24 he took Glenn Stout to work at Sam Brannan Middle School. There, he saw Jacobs at a bus stop and took him home. Jacobs and a "partner" got in; defendant dropped the "partner" at the light rail. Defendant said he had not talked to Jacobs on the phone in months.

Later in the interview, defendant said he was at home preparing to take Stout to work when Jacobs called him. Jacobs said he was by Sam Brannan School and asked defendant to come get him. Jacobs was with Eric Davis and Corey Carney (later, defendant said Carney was not there); they said something about someone "slippin'." Defendant said another man (later identified as Edward Thomas) had a gun. These other men said something about an old man, an alarm going off, and taking some change. Defendant claimed he did not know what happened until after the robbery. Once he saw the gun and the change, he "put two and two together."

At first, defendant said he had not been in Elk Grove for over two months, at which time he had gone to Strikes, a bowling alley. Later, he told a story about being with Jacobs and three other males and seeing a group of girls. He drove a bit looking for a place to park. The others got out of the car to talk to the girls; he stayed in the car and called his girlfriend. In another version, defendant said that while the group was on the way to Strikes, someone said they needed money and told him to park. He thought, "You all go do what you got to do," but he

did not think it would be "a lick" (a robbery). He was on the phone with his girlfriend. When the others returned 10 minutes later, one was laughing, saying, "That nigga was slipping, he left his front door open."

Throughout the interview, defendant denied he was involved in the robberies. A recording of the interview was played at trial.

Stout denied that defendant had given him a ride to work on October 24. His supervisor testified he would have been at work by 9:30 that morning or she would have heard about it.

Other Evidence

The police found Immoos's keys and work gloves in defendant's car. They also found a .22-caliber bullet on the rear floorboard and a .38-caliber bullet in the trunk well under the spare tire.

A review of cell phone records revealed there was no call from either of Jacobs's two cell phones to defendant's cell phone in the hours before the Taylor robbery. During the Immoos robbery, there were two calls on defendant's phone: a 41-second incoming call and an outgoing call lasting just over two minutes.

The police recovered three photographs from Davis's cell phone. These photographs were taken two days before and the day of the Taylor robbery. They showed defendant and others, including Carney, Thomas and Davis, throwing gang signs. Some of those pictured, although not defendant, wore red caps or sweatshirts; Thomas wore a Cincinnati Reds cap.

Gang Evidence

The People moved to introduce gang evidence at trial to show defendant's knowledge of the robberies and requested an evidentiary hearing. At the hearing, Detective Scott MacLafferty testified to his opinion that defendant was a member of the Meadowview Bloods gang. His opinion was based on the photographs of defendant posing with other suspected gang members throwing gang signs and the police reports that defendant had committed gang-related crimes like robbery in these two cases.

Defendant objected to the gang evidence, arguing it was not relevant and it was highly prejudicial.

The trial court ruled the gang evidence was material to three issues: the relationship of the perpetrators, defendant's knowledge of the criminal acts, and to prove a direct inconsistency in defendant's statement. The court allowed MacLafferty to testify about the Meadowview Bloods gang, its symbols, signs and colors, his opinion that defendant was a member, and gang psychology and culture. The court disallowed any testimony about predicate gang offenses, finding such testimony too inflammatory and prejudicial.[4] The court indicated

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[4] Despite this ruling, the expert testified at trial, without objection, to gang warfare in south Sacramento involving the G Parkway MOBB and various Blood gangs, which had resulted in 26 shootings in 18 months.

it was willing to give a limiting instruction.[5]

At trial, MacLafferty testified about the hand signs for the Meadowview Bloods and their association with the color red. He explained the process for validating gang members. He opined that defendant was a member of the Meadowview Bloods based on the photographs of defendant throwing "M" and "B" hand signs while associating with other apparent Meadowview Blood gang members and his involvement in the crimes.[6] He explained that Meadowview Bloods usually commit crimes as a group so they can instill as much fear and intimidation as possible on their victims.

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[5] The court instructed the jury: "You may consider evidence of gang membership only for the limited purpose of deciding whether the defendant acted with the intent, purpose and knowledge that are required to prove the charges--the crimes charged. You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his opinion. You may not consider evidence that a defendant is a member of a gang alone as proof of intent or of the facilitation, advice, aid, promotion, encouragement, or instigation needed to establish aiding and abetting. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."

[6] On cross-examination, defense counsel questioned using the current crimes to determine defendant was a gang member when the "cornerstone" of the justice system was "innocent until proven guilty." MacLafferty responded that the current police report was only one indicator and his opinion was based on the totality of the circumstances. He stated he was not required to use only convictions for gang validation. Defense counsel also pointed out that, according to MacLafferty, defendant made the "M" sign incorrectly.

DISCUSSION

Defendant contends the trial court erred in admitting the gang evidence. He argues that since the case was not charged as a gang case, the gang evidence had minimal probative value. He claims the gang evidence was cumulative to show his association with the other robbers, and the evidence that he and his cohorts were gang members was weak. He contends the evidence was prejudicial because there was no direct evidence that defendant, who drove the get-away car, knew of the robberies beforehand.

The trial court found such evidence was relevant and admissible on the issues of defendant's relationship with the other robbers, his knowledge of the criminal act, and to prove a direct inconsistency in defendant's statement. The People relied on the gang evidence to prove defendant's knowledge and intent.

I

Standard of Review and the Law

"In reviewing the ruling of the trial court, we reiterate the well-established principle that 'the admissibility of this evidence has two components: (1) whether the challenged evidence satisfied the "relevancy" requirement set forth in Evidence Code section 210, and (2) if the evidence was relevant, whether the trial court abused its discretion under Evidence Code section 352 in finding that the probative value of the [evidence] was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice.' [Citation.]" (*People v. Heard* (2003) 31 Cal.4th 946, 972.)

Gang evidence is not inadmissible per se in non-gang cases as it may be relevant to the charged crime. "In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation--including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like--can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1050 (*Hernandez*.)

II

Relationship Evidence and Aiding and Abetting

Defendant contends it was error to admit the gang evidence to show defendant's relationship with Jacobs, Davis, Thomas and Carney because there was ample evidence, especially defendant's own statements, to prove that relationship. Because the primary purpose of the gang evidence was to prove defendant knew about the robberies, and thus aided and abetted them, we turn to that point.

An aider and abettor must have knowledge of the perpetrator's criminal purpose. (*People v. Beeman* (1984) 35 Cal.3d 547, 560; *People v. Gibson* (2001) 90 Cal.App.4th 371, 386.) Gang evidence is relevant to prove aiding and abetting

(*People v. Burnell* (2005) 132 Cal.App.4th 938, 947) and to prove defendant's knowledge of the gang's criminal activities (*People v. Carr* (2010) 190 Cal.App.4th 475, 489). Here, the gang evidence was relevant to prove defendant knew about the robberies and aided and abetted them.[7]

III

Strength of the Evidence and Potential Prejudice

Defendant contends the gang evidence in this case was of only minimal relevance on the disputed issue of knowledge because the evidence that defendant and his cohorts were gang members was extremely weak. MacLafferty's opinion that defendant was a Meadowview Blood gang member was based on the photographs of defendant and others, some wearing red, throwing gang signs, as well as police reports indicating defendant had participated in these crimes. Defendant contends the photographs alone are inadequate to establish gang membership. He argues the reliance on red clothing, particularly red baseball caps, was insufficient to show gang membership. As to throwing gang signs, even MacLafferty admitted defendant made

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[7] Defendant contends the admission of gang evidence violated his due process right to a fundamentally fair trial and that such error is harmless only if the People can prove beyond a reasonable doubt that it did not contribute to the verdict. To establish a due process violation, the defendant must show there were no permissible inferences the jury could have drawn from the evidence. (*People v. Steele* (2002) 27 Cal.4th 1230, 1246.) Since the jury could have drawn permissible inferences from the gang evidence as to knowledge and defendant's association with the other robbers, defendant has failed to show a due process violation.

the sign incorrectly. Further, MacLafferty did not opine that the others pictured were Meadowview Bloods, only that they were "apparent" gang members. There was no other evidence, such as gang tattoos or gang paraphernalia, to show defendant was a gang member; of the 11 criteria used to validate a gang member per MacLafferty's testimony, defendant did not meet 10.

Defendant contends MacLafferty "went astray" in using the police reports of the current offenses to show defendant was a gang member. MacLafferty reasoned that home invasion robberies are the type of crime that Meadowview Bloods commit. Defendant argues this reasoning is illogical because it does not follow that anyone who commits such a crime is necessarily a Meadowview Blood.

In non-gang cases, "evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]" (*Hernandez, supra,* 33 Cal.4th at p. 1049.) We agree with defendant that the evidence of his gang membership was weak and its weakness lessened the probative value of the evidence. In this case, however, we find the error in admitting the gang evidence was harmless.

This is not a case like *People v. Memory* (2010) 182 Cal.App.4th 835 (*Memory*). In *Memory,* evidence of defendant's membership in a motorcycle club, that was not shown to be a criminal street gang, was admitted as gang evidence "to show defendants had a criminal disposition to fight with deadly force when confronted." (*Memory, supra,* 182 Cal.App.4th at p. 859.)

"The prosecutor sought through its opening statement, structure of its case in chief, examination of witnesses, and in closing arguments, to continually portray defendants as members of a violent one-percenter outlaw motorcycle club akin to the Hell's Angels." (*Memory, supra,* at p. 861.) Given the conflicting evidence of defendants' guilt, the inflammatory nature of the gang evidence with the comparison to the Hell's Angels, and the key issue of defendants' mental state, we found admission of the gang evidence reversible error. (*Id.* at pp. 863-864.)

Here, in contrast, the prosecution's main focus was on defendant's varying stories to the police attempting to explain his presence at both robberies, not his gang membership. The People argued, "You can tell the truth by the extent and number of lies told to cover the tracks."[8] The People then detailed five different versions of events defendant told about each incident. The People argued that defendant "lied repeatedly about this event in numerous ways and numerous times" and "innocent people don't lie."

Nor was the gang evidence as inflammatory as that admitted in *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*). In *Albarran*, the gang expert testified at length about 13 other gang members and the crimes they had committed and a specific threat to kill police officers; both the expert and the

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[8] The prosecutor attributed the quotation to Mark Twain. We note that Twain also famously said, "If you tell the truth you don't have to remember anything." http://www.twainquotes.com/Truth.html)

prosecutor made references to the Mexican Mafia. (*Albarran, supra,* 149 Cal.App.4th at pp. 228-229.) Here, the trial court excluded evidence of crimes committed by other Meadowview Bloods. MacLafferty did testify, unnecessarily, about gang warfare in south Sacramento, but defendant failed to object and the prosecutor did not mention this testimony in argument.

The trial court gave a limiting instruction on the use of the gang evidence. This instruction told the jury that evidence defendant was a gang member was insufficient *alone* to prove aiding and abetting. (See fn. 5, *ante*.) We presume the jurors understood and followed the court's instructions. (*People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1502.)

At trial, the defense argued, "These kids are wannabes," not gang members. The jury could well have accepted this argument and still convicted defendant; simple "posing" as gang members was not inconsistent with their commission of serious crimes of the type gang members commit. The evidence against defendant was strong and much of it came from his statements to the police. He placed himself as the get-away driver at each robbery, identified his coparticipants, and offered no credible reason for his being there other than to participate in the robbery.

As to the Taylor robbery, defendant claimed he was dropping his friend Stout at work. Both Stout and his supervisor denied that defendant drove Stout to Sam Brannan School about noon that day. Defendant's claim that Jacobs called him to pick him up was refuted by call records from both of Jacobs's cell phones.

Defendant's advance knowledge of the robbery was shown as much by his close association with his cohorts as by whether they were gang members. Defendant displayed a consciousness of guilt by "peeling out" as he sped away after the robbery.[9]

The evidence against defendant as to the Immoos robbery was even stronger. Defendant had no plausible explanation for being on Silvies Way when he claimed he was on his way to the Strikes bowling alley. He admitted he pulled over because one of his companions needed some money. His claim that he did not suspect a "lick" or robbery was implausible, given that the Taylor robbery had occurred only two days before under very similar circumstances. According to the neighbor, defendant pulled up his hood, shielding his face, as he waited and smoked in the car, even though it was warm.

Accordingly, the error in admitting the gang evidence was harmless. It is not reasonably probable defendant would have received a more favorable result without the admission of the gang evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

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[9] In closing argument, the defense argued the Taylor robbery was complete once the robbers got in defendant's car, so "he couldn't have aided and abetted anything." We disagree. "The crime of robbery is not complete until the robber has won his way to a place of temporary safety. [Citations.]" (*People v. Carroll* (1970) 1 Cal.3d 581, 585.) The robbers had not reached temporary safety in defendant's car. They were still on the crowded streets of South Land Park with a burglary alarm sounding. Indeed, Nakatomi was searching for them.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

ROBIE, Acting P. J.

HOCH, J.